Stafford's Restaurant, Inc.; Stafford's Seven Mile, Inc.; and Dan T. Vatsis *and* Hotel, Motel, Restaurant Employees and Bartenders Union, Local 24. Case 7-CA-17901

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 20 June 1983 Administrative Law Judge George Norman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, which is modified to reflect our amended remedy.

We agree with the judge's finding that the Respondent[1] violated Section 8(a)(5) and (1) of the Act by failing and refusing to pay the contractually required health and welfare and pension contributions to the appropriate trust funds on behalf of its employees.[2] We also agree that the Respondent further violated Section 8(a)(5) and (1) by failing and refusing to deduct union dues from the wages of those employees who had executed valid dues-checkoff authorizations. The judge recommended that the Respondent be ordered to cease and desist from its illegal conduct, make the fringe benefit fund payments mandated by the collective-bargaining agreement, and remit union dues to the Union in accordance with employee authorizations.[3] While neither the General Counsel nor the Union has filed exceptions to this recommended remedy, we have decided sua sponte that the judge's remedy is deficient in that it fails to provide for the possibility of interest or other additional amounts beyond the sum of the past due contributions, which might be necessary in order to satisfy a make-whole remedy.[4] Similarly, we have decided that in order to remedy completely the Respondent's failure to check off and remit dues to the Union, the Respondent must be ordered to make the Union whole for any loss it may have suffered as a result of the Respondent's unlawful conduct.[5]

Accordingly, we shall modify the recommended Order to require that the Respondent make whole its employees by making the contractually required payments to the health and welfare and pension funds,[6] and by reimbursing employees for any expenses ensuing from the Respondent's unlawful failure to make such required payments, as provided in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).[7] We

[1] As the answer to the complaint admitted that the corporate Respondents were alter egos and as we agree with the judge's finding that Dan T. Vatsis is an alter ego of the corporate Respondents, we shall refer jointly to all Respondents as "Respondent."

Unlike our dissenting colleague, we agree with the judge's imposition of personal liability on named Respondent Dan T. Vatsis. We find that *Contris Packing Co.*, 268 NLRB 193 (1983), is distinguishable since there we specifically found that the corporate officer involved was not the alter ego of the corporate respondent. Here it is clear that Vatsis is the alter ego of the corporate respondents—as the judge found—and his personal liability flows from that finding. Our dissenting colleague would distinguish *Carpet City Mechanical Co.*, 244 NLRB 1031 (1979), on the ground that there the individual held personally liable sought to evade liability by petitioning the State for dissolution of the corporation and falsely stating in that petition that no lawsuits were pending. Here too, however, Vatsis sought to avoid liability and thereby frustrate the Board's fashioning of an effective remedy for the Respondent's unfair labor practices by avoiding service of the amended complaint and a subpoena issued by the Board. Vatsis refused to accept service of these documents by certified mail and evaded personal service by a U.S. marshal by refusing to open his door. When the marshal telephoned Vatsis, Vatsis informed him that Vatsis was avoiding service on the advice of his attorney.

Contrary to her colleagues, Member Dennis would not find that Dan T. Vatsis is the alter ego of the Respondent corporations and would not hold him personally liable for the unfair labor practices committed. See *Contris Packing Co.*, supra, finding that an individual's status as corporate officer, his ownership of the corporation, and his participation in the commission of unfair labor practices were insufficient to justify an alter ego finding or imposing personal liability. *Carpet City Mechanical Co.*, 244 NLRB at 1034, which the judge cites, is distinguishable because there the individual held personally responsible attempted to evade the corporation's backpay liability by petitioning the State for dissolution of the business and falsely representing that no lawsuits were pending. Here, by contrast, the facts show only that Vatsis resisted service of documents on himself as an individually named Respondent, and there was no attempt to evade service on the Respondent corporations. Under these circumstances, Member Dennis rejects her colleagues' circular reasoning that Vatsis must be held personally liable because he sought to avoid personal liability in a case in which such liability is not warranted under *Contris Packing Co.*

[2] Contrary to his colleagues Chairman Dotson would not find at this time that Respondent violated Sec. 8(a)(5) and (1) by failing to make the required fringe benefit fund payments. The Chairman would defer this issue to a pending state court proceeding brought by the real party in interest, the fund trustees, to recover the past due payments. In his view, the Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific performance of a contract. Cf. *United Telephone Co.*, 112 NLRB 779 (1955).

[3] Of course, the Respondent's duty to check off union dues was extinguished upon expiration of the collective-bargaining agreement which created that duty. See *Robbins Door & Sash Co.*, 260 NLRB 659 (1982), and cases cited therein.

[4] See *Merryweather Optical Co.*, 240 NLRB 1213 (1979). We note that the Respondent's restaurants have ceased operation. Hence, the Respondent's liability for continuing trust fund contributions stopped accruing at the time of the closures.

[5] *J. F. Swick Insulation Co.*, 247 NLRB 626 (1980); *Fitzpatrick Electric*, 242 NLRB 739 (1979); *Shen-Mar Food Products*, 221 NLRB 1329 (1976).

[6] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, pending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Co.*, supra.

[7] See also *F. Landon Cartage Co.*, 265 NLRB No. 177 (Dec. 16, 1982) (not published in Board volumes).

shall further modify the recommended Order by requiring the Respondent to make the Union whole by payment to it for any loss of dues suffered as a result of the Respondent's failure to comply with the collective-bargaining agreement, with interest thereon computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Stafford's Restaurant, Inc.; Stafford's Seven Mile, Inc.; and Dan T. Vatsis, Detroit and Oak Park, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Make whole the unit employees by making all payments to the health and welfare and pension funds required by the collective-bargaining agreement, and further make them whole by reimbursing them for any expenses ensuing from the Respondent's unlawful failure to make such required payments, in the manner set forth in this Decision and Order."

2. Substitute the following for paragraph 2(b).

"(b) Honor the collective-bargaining agreement's checkoff provisions and the valid dues-checkoff authorizations filed with the Respondent, and remit to the Union all dues the Respondent should have checked off pursuant to that collective-bargaining agreement, together with interest on such sums computed in the manner set forth in this Decision and Order."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively with Hotel, Motel, Restaurant Employees and Bartenders Union, Local 24 as the exclusive collective-bargaining representative of the unit of our employees described below. The appropriate collective-bargaining unit is:

> All employees employed by Stafford's Restaurant, Inc. and Stafford's Seven Mile, Inc., including head cooks, short order cooks, pastry employees, pantry employees, utility employees, hosts, hostesses, waiters, waitresses and bus employees, but excluding guards and supervisors as defined in the Act.

WE WILL NOT repudiate and fail to honor, abide by, and apply the terms of our collective-bargaining agreement with the Union.

WE WILL NOT unilaterally discontinue contributions to the health and welfare and pension funds provided for in the applicable collective-bargaining agreement.

WE WILL NOT fail to honor the dues-deduction authorizations of unit employees and fail to disburse such dues to the Union in accordance with the terms of the applicable collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse the Union for the losses due to our failure to honor the union dues-deduction authorizations of unit employees with interest.

WE WILL make whole our unit employees by transmitting the contributions owed to the Union's health and welfare and pension funds pursuant to the terms of our collective-bargaining agreement with the Union, and by reimbursing unit employees for any medical or other expenses ensuing from our unlawful failure to make such required contributions. This shall include reimbursing employees for any contributions they themselves may have made for the maintenance of the Union's health and welfare and pension funds after we unlawfully discontinued contributions to those funds; for any premiums they may have paid to third-party insurance companies to continue medical coverage in the absence of our required contributions to such funds; and for any medical bills they have paid directly to

health care providers that the contractual policies would have covered.

STAFFORD'S RESTAURANT, INC.; STAFFORD'S SEVEN MILE, INC.; AND DAN T. VATSIS

DECISION

STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge. This case was heard in Detroit, Michigan, on May 2, 1983. On July 31, 1980, the Regional Director for Region 7 of the National Labor Relations Board issued a complaint and notice of hearing against Stafford's Restaurant, Inc. and Stafford's Seven Mile, Inc., based on a charge filed by Hotel, Motel, Restaurant Employees, Cooks and bartenders Union, Local 24, on June 18, 1980, alleging that the Employer has refused to bargain collectively with the Union; sought to terminate the collective-bargaining agreement contrary to the provisions of Section 8(d) of the National Labor Relations Act; and has failed and refused to contribute to the health-welfare fund and pension fund on behalf of its employees in an effort to terminate the bargaining relationship with the Union in violation of Section 8(a)(1) and (5) of the Act.

Thereafter, an informal settlement agreement was entered into by the Respondent and the Charging Party and approved by the Regional Director on December 3, 1980. The Respondent, however, failed and refused to comply with the terms of the settlement agreement. The Regional Director on April 29, 1982, set aside the settlement agreement and ordered that the complaint be reissued pursuant to Section 102.15 of the Board's Rules and Regulations. On February 9, 1983, the Regional Director issued an amended complaint and notice of hearing naming Dan T. Vatsis as an additional Respondent.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs filed on behalf of the General Counsel and the Respondent were thoroughly considered.

On the entire record of the case and on my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Stafford's Restaurant, Inc., also referred to as Respondent Nine Mile, and Stafford's Seven Mile, Inc., each is a Michigan corporation. Respondent Nine Mile has maintained its principal office and place of business in the city of Oak Park, Michigan. Respondent Seven Mile, Inc. has maintained its principal office and place of business in Detroit, Michigan. Each Respondent is and has been at all times material herein, engaged in the retail sale of food and beverages. The Respondent admits, and I find, that Respondent Nine Mile and Respondent Seven Mile, Inc., as a single integrated enterprise, is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Hotel, Motel, Restaurant Employees and Bartenders Union, Local 24, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

All the material facts herein are either admitted by the Respondent or are uncontroverted. The Respondent admits that the Charging Party has since approximately 1952 been the exclusive representative for the purpose of collective bargaining for its employees at both its Seven Mile, Inc. and Nine Mile restaurant. The Respondent's answer further admits that the Respondent, as a single employer, was party to a collective-bargaining agreement with the Charging Party effective from June 1, 1978, to January 1, 1981, which provided for the payment by the Respondent of moneys into various fringe benefits funds on behalf of its employees and also for the deduction of union dues from the wage of employees who had given the Respondent authorization to do so. The affidavit of Dan Theodore Vatsis, which has been received in evidence, contains admissions that the Respondent has not, as of July 1980, made any of the contractually required health and welfare or pension payments for approximately 6 months for the employees at the Respondent's Seven Mile, Inc. restaurant and 2 months for the Nine Mile employees. Vatsis' affidavit further admits that the Respondent has not, for months, deducted any dues from the paychecks of the Seven Mile, Inc. employees even though the employees had authorized the Respondent to make said deduction. Vatsis' affidavit also admits that he owns 50 percent of the stock of both the Seven Mile, Inc. and Nine Mile, Inc. and Nine Mile restaurants with his brother and mother each owning the remaining 50 percent in equal portions.

The Respondent's failure to pay the contractual fringe benefits on behalf of its employees continued through 1980 and 1981. The Respondent stipulated that its Nine mile restaurant terminated business operations on December 15, 1981, and that it ceased doing business at its Seven Mile, Inc. facility about January 29, 1982.[1]

A. *Analysis and Conclusions*

A refusal to make contributions to fringe benefits funds on behalf of its employees, as required by a collective-bargaining agreement, is a change in the terms and conditions of employment for the employees covered thereunder and is therefore a violation of Section 8(a)(1) and (5) of the Act, in that it deprives the employees of their statutory right to have their union as their collective-bargaining agent to bargain about any changes in the terms and conditions of employment. *C & C Plywood*

[1] At a time unknown, the pension fund instituted a lawsuit in the 36th District Court of Michigan to collect moneys owned by the Respondent corporations. A trial date is scheduled sometime in Febuary 1984. The lawsuit does not name Respondent Daniel T. Vatsis as a party and the period of time for the completion of the suit is unknown.

Corp, 148 NLRB 414, 415 (1964); affirmed 305 U.S. 421 (1967). Inasmuch as the Respondent presented no evidence in its defense, there is no explanation for its failure to make the contractually required fringe benefits payments on behalf of its employees. Respondent Dan Vatsis' affidavit contains the following reason for the Respondent's nonpayment of fringe benefits:

> I haven't made the health welfare pension and payments because we don't have the money . . . . The main reason I don't send in the pension payments is because it takes a lot of time—4–5 hours a month.[2]

Thus, there is no credible record evidence that the Respondent failed to pay the contractually required fringe benefits for any reason other than Dan Vatsis thought it took too much time to remit the money to the funds. The Respondent's failure to deduct membership dues from its employees paychecks at its Seven Mile, Inc. restaurant violated Section 8(a)(5) and (1) of the Act. *Independent Stave Co.*, 248 NLRB 219 (1980).

B. *The State Court Proceeding*

The Respondent did not raise the issue of the state court proceeding at the trial and, although it did not present a defense, the Respondent was represented by counsel and had full opportunity to fully litigate the unfair labor practice allegations. The Respondent, however, did raise it in its posthearing brief.

The state court proceeding will not provide the remedy of the Respondent's failure to deduct union dues from its employees' paychecks and names only the Respondent corporation and not Dan T. Vatsis as defendants. Therefore, that action cannot provide a full remedy for all the unfair labor practices alleged. Moreover, the United States Supreme Court has recognized that the Board is vested with primary jurisdiction to determine what is or what is not an unfair labor practice. *Kaiser Steel Corp. v. Mullens*, 642 F.2d 1302 (DC Cir. 1980), affd. 109 LRRM 2268 (1982).

Both Respondent corporations were small, closely held entities owned entirely by the Vatsis family with Dan T. Vatsis holding 50 percent of the stock in each. While Dan T. Vatsis' official title in the corporation is not known, his affidavit makes clear that he was the person who performed the payroll functions for both restaurants and it was he who decided not to make the fringe benefit payments on behalf of employees, or to deduct the dues from employees' paychecks. The Respondent admitted that Vatsis was a supervisor within the meaning of Section 2(11) of the Act and stipulated that it ceased business operations at the two restaurants more than 1 year ago.

I consider Dan T. Vatsis so closely identified with the operation of the Respondent corporations that he is, in fact, an alter ego of those corporations and subject, therefore, to individual liability for remedying the unfair labor practices herein. Inasmuch as Vatsis committed the unfair labor practices and the Respondent ceased doing business over 1 year ago, I find Vatsis individually liable. Such a finding of liability will prevent a total frustration of the implementation of the policies of the Act by Respondent's cessation of its operations. *Carpet City Mechanical Co.*, 244 NLRB 1031, 1034 (1979), and cases cited therein.

Accordingly, based on the entire record in this matter, I find that the Respondent's failure to pay the contractually required health and welfare pension contributions on behalf of its employees and its failure to deduct union dues from its employees who had given it prior permission to do so, violated Section 8(a)(1) and (5) of the Act, and therefore I shall recommend that Stafford's Restaurant, Inc.; Stafford's Seven Mile, Inc.; and Dan T. Vatsis be ordered jointly and severally to remedy the unfair labor practices by making all fringe benefits payments which are owed to the health and welfare and pension funds, remitting dues deductions, and by mailing appropriate notices to employees at their last known addresses.

CONCLUSIONS OF LAW

1. The Respondent, Stafford's Restaurant, Inc.; Stafford's Seven Mile, Inc.; and Dan T. Vatsis is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel, Motel, Restaurant Employees and Bartenders Union, Local 24, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Respondent Nine Mile and Respondent Seven Mile, including head cooks, short-order cooks, pastry employees, pantry employees, utility employees, hosts, hostesses, waiters, waitresses, and bus employees, but excluding guards and supervisors as defined in the Act constitute a unit of employees appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to pay the contractually required health and welfare and pension contributions on behalf of its employees and by Respondent's failure to deduct union dues from its employees who had given it prior permission to do so, the Respondent has violated Section 8(a)(1) and (5) of the Act.

5. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[2] The statements contained in Dan Vatsis' affidavit which are unfavorable to the Respondent's position may be considered admission of a party opponent; any favorable statements should be excluded as heresay. *Consolidated Accounting Systems*, 225 NLRB 93, 95 (1976), and cases cited therein. A lack of funds does not justify a unilateral modification of a collective-bargaining agreement. *Airport Limousine Service*, 231 NLRB 932 (1977).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Stafford's Restaurant, Inc.; Stafford's Seven Mile, Inc.; and Dan T. Vatsis, Detroit and Oak Park, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from engaging in a refusal to bargain collectively with the Union as the exclusive bargaining representative of all the employees in the unit described above, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all fringe benefit payments owed to the various fringe benefits funds described in the collective-bargaining agreement.

(b) Remit union dues to the Charging Party in according with employee authorizations to the Respondent.

(c) Mail appropriate notices to employees at their last known addresses. Copies of the notices on forms provided by the Regional Director for Region 7, after being duly signed by the Respondent's representative, shall be mailed by the Respondent immediately upon receipt thereof to its employees at their last known addresses.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.